

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. GUERIN	:	CRIM. NO. 91-601-1
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	CIVIL NO. 97-2860

**MEMORANDUM AND ORDER**

BECHTLE, J.

APRIL , 1999

Presently before the court in this 28 U.S.C. § 2255 action are petitioner James H. Guerin's ("Petitioner") Motion to Alter or Amend the Judgment and for Additional Findings, or in the alternative, for reconsideration and the government's response thereto. For the reasons set forth below, the court will deny Petitioner's motion.

**I. BACKGROUND**

On December 29, 1998, the court adopted the United States Magistrate Judge's Report and Recommendation and denied Petitioner's petition for writ of habeas corpus without an evidentiary hearing. Guerin v. U.S., Crim. No. 91-601-1, Civ. No. 97-2860, 1998 WL 961908, at \*7 (E.D. Pa. Dec. 29, 1998). The court rejected Petitioner's claims of ineffective assistance of counsel at his plea negotiation, at his sentencing and in advising him of his right to appeal. Id. at \*2-\*6.

Petitioner's instant motion challenges the court's finding that Petitioner was not deprived of his right to appeal by ineffective assistance of counsel. Pursuant to Federal Rules of

Civil Procedure 52(b) and 59(e), Petitioner requests the court to find that "on the basis of the existing record and of the attached supplemental affidavits, that [Petitioner's] former attorney, Joseph A. Tate, Esq., was under the mistaken impression in June 1992 that no appeal could lie from the sentence imposed by this court in this case, because the Court had granted a downward departure." (Pet.'s Mem. at 1.) In the alternative, Petitioner moves for reconsideration under Local Rule 7.1(g) and requests that "the hearing be reopened so that the Court may hear the testimony described in the affidavits" accompanying Petitioner's motion. Id.

## **II. LEGAL STANDARDS**

The Federal Rules of Civil Procedure allow a party to move the court to alter or amend a judgment. Fed. R. Civ. P. 59(e). In addition, upon motion by a party, "the court may amend its findings or make additional findings and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). Motions under Rule 52(b) and/or 59(e) may be based on manifest error of fact or law, but are "not intended to allow the parties to relitigate old issues, to advance new theories, or to rehear the merits of a case." Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993); see Renfro v. City of Emporia, 732 F. Supp. 1116, 1117 (D. Kan. 1990); Lyons v. Jefferson Bank & Trust, 793 F. Supp. 989, 991 (D. Colo. 1992); Evans, Inc. v. Tiffany & Co., 416 F. Supp 224, 244 (N.D. Ill. 1976).

Local Rule 7.1(g) of Civil Procedure for the Eastern District of Pennsylvania allows a party to make a motion for reconsideration. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). "Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration." Id.; see McNaughton v. U.S., 3 F. Supp. 2d 592, 601 (E.D. Pa. 1998).

### **III. DISCUSSION**

The court will deny Petitioner's motion. First, the court will address why it will not consider the supplemental affidavits accompanying Petitioner's motion. Second, the court will address why nothing in the existing record causes it to amend or alter its Memorandum and Order of December 29, 1998.

#### **A. Supplemental Affidavits**

Petitioner requests that the court consider, in addition to the existing record, the supplemental affidavits accompanying his motion. The affidavits of Shirley A. Baker, Petitioner's daughter, Thomas H. Guerin, Petitioner's son and Anne M. Guerin, Petitioner's daughter-in-law, all declare that Petitioner's former attorney, Joseph A. Tate, Esq. ("Tate"), advised Petitioner on June 8, 1992 that he would lose his right to appeal if the court departed from the guidelines. The affidavit of Professor Abbe L. Smith expresses the opinion that, based upon

the court's findings of fact concerning Tate's conduct, Petitioner's waiver of his appeal rights were "ambiguous at best," and that Tate "did not press his client" hard enough in advising him to appeal. (Prof. Smith Aff. ¶¶ 7 & 13.)

The court will not consider Petitioner's supplemental affidavits accompanying his motion because they are not based on newly discovered evidence. See Lyons, 793 F. Supp. at 991 (stating that "[e]xcept for motions to amend based on newly discovered evidence . . . the trial court is required only to amend its findings or make additional findings based on evidence contained in the record"). The affidavits of Petitioner's three family members, Shirley Baker, Thomas Guerin and Anne Guerin, all describe their perceptions about what Tate said at a meeting on June 8, 1992, the day before Petitioner was sentenced. The affidavit of Professor Smith provides an expert opinion evaluating Tate's conduct in advising Petitioner of his appellate rights. Petitioner fails to show that any of these affidavits are based on newly discovered evidence. Petitioner had ample opportunity to introduce the testimony of these affiants prior to the court's dismissal of Petitioner's habeas petition. Petitioner's attempt to introduce this evidence for the first time in his instant motion is inappropriate. See Renfro, 732 F. Supp. at 1117 (stating that "'a party's failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend'" (citation omitted)). Thus, the court will not consider the supplemental

affidavits accompanying Petitioner's motion.

**B. Existing Record**

The court finds nothing in the existing record which warrants an amendment or alteration of its December 29, 1998 Memorandum and Order dismissing Petitioner's habeas petition. In challenging the court's finding that Tate adequately informed Petitioner of his rights, Petitioner argues that "[n]either Mr. Tate's statements to the press immediately after sentencing . . . nor Mr. Guerin's letter to his family two weeks after surrendering . . . can be reconciled with a finding that Mr. Tate fully and accurately advised his client concerning the right to appeal." (Pet.'s Mem. at 2.) The court has reviewed the existing record and finds nothing in it to warrant a change in its finding that Tate adequately informed Petitioner of his appellate rights and that Petitioner waived those rights. Tate's statements to the press indicated that he was satisfied with Petitioner's sentence and that no appeal would be filed. (Ex. Q.)<sup>1</sup> Such a statement is consistent with the court's finding that Petitioner chose not to appeal his sentence. Petitioner's letter to his family expresses anger at Tate's statement that he was satisfied with Petitioner's sentence. (Ex. U.) However, the letter does not address anything concerning Tate's advice to Petitioner about his appellate rights. Id. Neither Tate's statements to the press nor Petitioner's letter to

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<sup>1</sup> All citations to Ex. \_\_\_\_ refer to exhibits of record in Petitioner's habeas petition.

his family reveal a manifest error in the court's finding that Tate adequately informed Petitioner of his appellate rights and that Petitioner knowingly and voluntarily waived those rights. Thus, the court declines to alter or amend its Order denying Petitioner's petition for writ of habeas corpus without an evidentiary hearing.<sup>2</sup> Guerin, 1998 WL 961908, at \*7.

### **III. CONCLUSION**

For the foregoing reasons, the court will deny Petitioner's motion.

An appropriate Order follows.

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<sup>2</sup> Petitioner also challenges the court's finding that he could not meet the prejudice prong of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, Petitioner argues that even though the court informed him of his right to appeal at sentencing, his waiver was not voluntary in light of Tate's alleged statement that he could not appeal. (Pet.'s Mem. at 2-3.) Because the court stands by its finding that Tate adequately informed Petitioner of his right to appeal, the court need not address this argument.

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UNITED STATES OF AMERICA	:	CIVIL NO. 97-2860

ORDER

AND NOW, TO WIT, this        day of April, 1999, upon  
consideration of petitioner James H. Guerin's Motion to Alter or  
Amend the Judgment and for Additional Findings, or in the  
alternative, for reconsideration and the government's response  
thereto, said motion is DENIED.

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LOUIS C. BECHTLE, J.